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Supreme Court of the United States

ABDUL H. KHAN, YASMEEN HASEEB,
SARAH HASEEB, SANA HASEEB,

Petitioners,

—v.—

ERIC H. HOLDER, JR.,
UNITED STATES ATTORNEY GENERAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

The government does not dispute that there is a direct conflict on the question presented. BIO 12. Moreover, the conflict has now solidified into a 9-2 split. In *Ge v. Holder*, -- F.3d --, 2009 WL 4281472 (2d Cir. Dec. 2, 2009), the Second Circuit squarely held that it may review whether an asylum applicant satisfied the filing exceptions on the facts of his case.

The government also does not claim that the issue in this case is unworthy of the Court's attention. Although the government has consistently opposed review on vehicle grounds in prior cases on this issue, it has acknowledged that the issue is "important" (BIO 5 in *Kourouma v. Mukasey*, No. 07-7726 (2008)); a "recurring" one (BIO 10 in *Viracacha v. Mukasey*, No. 07-1363 (2008)); and that the conflict "may warrant this Court's attention in an appropriate case" (BIO 10 in *Eman v. Holder*, No. 08-1317 (2009)); *see also* BIO 9 in *Lopez-Cancinos v. Gonzales*, No. 06-740 (2007) (unsuitable vehicle).[1]

[1] The petition in *Viracacha*, No. 07-1363, was re-listed twice before being denied at the third conference.

Contrary to the government's contention, this case is not an unsuitable vehicle. The Seventh Circuit squarely addressed the question and there is no obstacle that would prevent this Court from reaching the issue.[2]

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION WILL ALLOW THE COURT TO RESOLVE AN ENTRENCHED CIRCUIT SPLIT.

A. This Case Involves An Important And Recurring Question On Which The Courts Of Appeals Are Divided.

1. The government does not dispute that the circuits are splintered in both result and analysis, that the split is entrenched and longstanding, that eleven circuits have ruled on the issue, that further litigation in the lower courts will not eliminate the disagreement, and that this precise jurisdictional issue has arisen in hundreds of asylum cases over the past few years. Pet. 17-22.

Nor does the government dispute that the conflict hinges in significant part on contrary interpretations of *I.N.S. v. St. Cyr*, 533 U.S. 289 (2001), which only this Court can reconcile. *Compare, e.g., Ramadan v. Gonzales*, 479 F.3d 646, 652-54 (9th Cir. 2007) (per curiam) (Section 1252(a)(2)(D) must include claims involving the

[2] The jurisdictional issue in this case is also presented in *Gomis v. Holder*, No. 09-194, petition for cert. pending (filed Aug. 11, 2009).

application of law to fact because a "narrower interpretation would pose a serious Suspension Clause issue" under *St. Cyr*), *with* Pet. App. 16a n.4 (opinion below) (*St. Cyr* was concerned only with *pure* legal questions and "did not suggest that the inability to review mixed questions of law and fact would raise constitutional concerns"). *See also* Pet. 20-21, 28-31.

The government does take issue, however, with petitioner's characterization of Second Circuit law, citing *Chen v. United States Dep't of Justice*, 471 F.3d 315 (2d Cir. 2006), for the proposition that the Second Circuit will not review whether an applicant's facts satisfy the filing exceptions. BIO 18. But *Ge* makes clear that the Second Circuit will review such claims.

As explained in the petition (at 18-19), the Second Circuit in *Chen* concluded that the petitioner in that case had not raised a reviewable claim involving the application of law to fact. 471 F.3d at 330. But *Chen* left no doubt that review is available under Section 1252(a)(2)(D) to review the application of law to fact. *Id.* at 324-28.

In *Ge*, the Second Circuit reversed the BIA's determination that petitioner had not satisfied the asylum filing exceptions, holding that it could review "the BIA's application of the 'changed circumstances exception'" to petitioner's facts. 2009 WL 4281472, at *4. In rejecting the government's jurisdictional position, the court explained that where an asylum applicant argues that there has been a

"misapplication" of the filing exceptions to the facts of his case, he is not merely "quibbling about factual findings." *Ibid.*

2. The government also does not dispute that Section 1252(a)(2)(D) is the centerpiece of the Immigration Act's judicial review scheme, that it has been cited in more than 1000 cases since its 2005 passage, or that the courts of appeals have generally adopted conflicting interpretations of the term "questions of law." The government contends, however, that the issue here does not have implications beyond asylum, because each case depends on the "precise nature of the claim" asserted in the petition for review. BIO 19 n.6. But contrary to the government's assertion, the "precise nature of the claim" does not alter the critical threshold question dividing the courts of appeals: whether, in general, the term "questions of law" is limited to *pure* legal issues or instead encompasses the application of law to fact (as six of nine circuits have held). Pet. 20; *see also* Pet. 23-27 (noting additional common questions). In any event, given the number of asylum cases affected by the conflict, this Court's review is warranted.

B. The Seventh Circuit's Decision Squarely Presents The Issue On Which The Circuits Are Divided.

The government cryptically argues that this case suffers from three vehicle problems. BIO 19. The government's contentions are incorrect. Notably, moreover, the government does not contend

that these vehicle problems would prevent the Court from reaching the jurisdictional question in this case.

1. The government argues that this is a poor vehicle because the Seventh Circuit believed that its lack of jurisdiction was "clear" in this case. BIO 19 (quoting Pet. App. 14a). But the Seventh Circuit has repeatedly reached the same result in numerous cases on this issue, and indeed, has consistently held that, in general, it may not review the application of law to fact. *Viracacha v. Mukasey*, 518 F.3d 511, 514-16 (7th Cir. 2008) (no jurisdiction to review whether facts satisfied the changed circumstances exception because the "application of law to fact" is not reviewable under Section 1252(a)(2)(D)); *Cevilla v. Gonzales*, 446 F.3d 658, 661 (7th Cir. 2006) (no jurisdiction to review whether petitioner's facts satisfied statutory waiver provision because Section 1252(a)(2)(D) covers only "pure" questions of law).[3]

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[3] *See also Patel v. Holder*, 581 F.3d 631, 634 (7th Cir. 2009) (no jurisdiction over "changed" or "extraordinary" circumstances determination); *Ishitiaq v. Holder*, 578 F.3d 712, 716-17 (7th Cir. 2009); *Ghaffar v. Mukasey*, 551 F.3d 651, 654 (7th Cir. 2008); *Khan v. Mukasey*, 287 Fed. Appx. 537, 539 (7th Cir. 2008); *Huang v. Mukasey*, 525 F.3d 559, 563 (7th Cir. 2008); *Ogayonne v. Mukasey*, 530 F.3d 514, 519 (7th Cir. 2008); *Karim v. Mukasey*, 270 Fed. Appx. 433, 434 (7th Cir. 2008); *Mutitu v. Gonzales*, 2007 WL 1849451, at *2 (7th Cir. Jun. 27, 2007); *Kaharudin v. Gonzales*, 500 F.3d 619, 622-23 (7th Cir. 2007); *Herdiansyah v. Gonzales*, 224 Fed. Appx. 508, 514 (7th Cir. 2007); *Pupella v. Gonzales*, 207 Fed. Appx. 683, 685 (7th Cir. 2006); *Zeqiri v. Mukasey*, 529 F.3d 364, 369 (7th Cir. 2008); *Pavlyk v. Gonzales*, 469 F.3d 1082, 1086-87 (7th Cir. 2006); (continued...)

2. The government also relies on the Seventh Circuit's statement that Mr. Khan's case does not involve the application of law to "undisputed" facts because the facts were disputed before the *immigration judge*. BIO 19 (quoting Pet. App. 17a n.5). The government understandably does not elaborate on this point. As explained in the petition (at 33 n.15), the relevant question is not whether the facts were disputed at the trial level, but whether petitioner accepted the adjudicated facts on appeal and argued that those established facts satisfied the statutory standard. *See, e.g.*, *Pullman-Standard v. Swint*, 456 U.S. 273, 289 n.19 (1982) (defining mixed question as one where the law is applied to the "admitted *or* established" facts) (emphasis added).

3. Finally, the government suggests that review is not warranted because the BIA concluded that petitioner had not filed within a "reasonable" period after the one-year deadline and that this was

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(...continued)
Sanchez-Melo v. Gonzales, 195 Fed. Appx. 526, 530 (7th Cir. 2006); *Chun Lin Zhao v. Gonzales*, 177 Fed. Appx. 499, 501 (7th Cir. 2006); *Disha v. Gonzales*, 207 Fed. Appx. 694, 697 (7th Cir. 2006); *Sokolov v. Gonzales*, 442 F.3d 566, 568 (7th Cir. 2006); *Ikama-Obambi v. Gonzales*, 470 F.3d 720, 724 (7th Cir. 2006); *Berinde v. Gonzales*, 203 Fed. Appx. 732, 735 (7th Cir. 2006).

an "*independent* ground" for the BIA's decision. BIO 19 (emphasis in original).[4]

The government does not contend, however, that the BIA's "reasonable period" ruling would prevent this Court from squarely addressing whether the Seventh Circuit had jurisdiction to review the "extraordinary circumstances" exception. Indeed, the Seventh Circuit's analysis did not even mention the BIA's "reasonable period" conclusion, much less attach independent jurisdictional significance to it. Thus, it would be for the Seventh Circuit, on remand, to decide whether it had jurisdiction to review the "reasonable period" determination.

In any event, even if the BIA's "reasonable period" ruling were at issue, that would not make this case a poor vehicle, but a more comprehensive one, given that both the Second and Ninth Circuits have concluded that they may review whether an applicant filed within a "reasonable" period of time. *See Ge*, 2009 WL 4281472, at *4 (reviewing and reversing BIA's determination that application was not filed within a "reasonable time after a change of circumstances"); *Husyev v. Mukasey*, 528 F.3d 1172, 1178-79 (9th Cir. 2008) (reviewing "reasonable

[4] The "reasonable period" requirement was added by implementing regulations. 8 C.F.R. 208.4(a)(4); 208.4(a)(5). Pet. App. 75a-78a.

period" determination); *Wakkary v. Holder*, 558 F.3d 1049, 1057-58 (9th Cir. 2009) (same).[5]

C. The Government's Speculation That Mr. Khan May Not Prevail On Remand Is Not A Basis On Which To Deny Review Of The Jurisdictional Issue In This Case.

1. The government does not contend that the Seventh Circuit addressed whether Mr. Khan satisfied the exception for extraordinary circumstances. The government's speculation that petitioner would not be able to do so on remand is incorrect and should not be the basis for denying review of the jurisdictional question here. As discussed below, Mr. Khan will be able to show that the statutory exception was incorrectly applied to his case. *See infra* Section II.B (explaining that the IJ and BIA misapplied the statutory exception by requiring that an applicant with post-traumatic symptoms show that he was unable to engage in normal life activities). Moreover, the government incorrectly assumes that petitioner's claims would necessarily be evaluated under the substantial evidence test. *But see Ornelas v. United States*, 517

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[5] Contrary to the government's contention (at 19), a "reasonableness" determination does not involve an inherently factual inquiry, and necessarily turns on the legal context in which the term is used. *See, e.g., United States v. Irvine*, 511 U.S. 224, 234-35 (1994); *Muehler v. Mena*, 544 U.S. 93, 98 & n.1 (2005).

U.S. 690, 699-700 (1996) ("*de novo*" review proper for assessing the application of law to fact).[6]

2. The government alternatively speculates (at 20-21) that Mr. Khan's asylum application would be denied on the merits because he will not be able to show the requisite nexus between his political opinion and his treatment at the hands of the MQM. BIO 21-22. The government, however, fails to take into account that Mr. Khan can prevail on his asylum claim by showing *future* persecution if his claim is remanded to the agency. And because it is impossible to predict the conditions in Pakistan at the time of a remand, much less the role that the MQM will play in Pakistan, the government's speculation should not be a basis for denying the petition. *See* U.S. Dep't of State, 2008 Country Reports on Human Rights Practices: Pakistan (MQM is politically powerful and violent), http://www.state.gov/g/drl/rls/hrrpt/2008/sca/119139.htm.

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[6] The government also incorrectly argues that the BIA's reasonable period determination would be upheld if the Seventh Circuit had jurisdiction. BIO 21. But the agency's reasonable period determination suffers from the same legal flaw as the agency's "extraordinary circumstances" ruling: it incorrectly required petitioner to show that he was literally debilitated in all parts of his life. *See infra* Section II.B.

The government further claims (at 21) that petitioner argued in the Seventh Circuit only that the BIA's "reasonable period" determination was *per se* erroneous. That is incorrect. *See* Pet. C.A. Br. 35 (noting, among other things, that ruling was erroneous in Mr. Khan's "situation").

3. Finally, the government suggests that petitioner's inability to apply for asylum is of diminished importance because he was able to apply for withholding. BIO 11, 14. But Congress has made both forms of relief available, and asylum is the principal form of relief for refugees. *See* Amicus Brief 2-4 (brief by asylum experts), *filed in Gomis v. Holder*, *supra*, No. 09-194.[7]

II. THE SEVENTH CIRCUIT'S DECISION WAS INCORRECT.

A. Section 1252(a)(2)(D) Covers The Application Of Law To Fact.

The government agrees with the court of appeals that the preclusion of all review over "mixed questions of law and fact" would not raise "constitutional concerns." BIO 16 n.5 (internal quotes omitted). Yet the government does not address the fact that this Court in *St. Cyr* specifically recognized that habeas review has always included review of the proper "application" of the laws. 533 U.S. at 302. And, critically, both the government and Seventh Circuit wholly ignore *Boumediene v. Bush*, 128 S.Ct. 2229, 2266 (2008) (quoting and reaffirming *St. Cyr*'s analysis of the scope of habeas review); Pet. 27-31.

Instead, the government (and Seventh Circuit) rely on a sentence in the Conference Report stating

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[7] Contrary to the government's implication (at 9), Mr. Khan did not act improperly in appealing his case rather than voluntarily returning to a country where he feared persecution.

that courts can review the "legal" but not the "factual" aspects of a mixed question. BIO 16-17; Pet. App. 14a. But that says nothing about the Suspension Clause. It also says nothing about whether Congress intended to limit the term "questions of law" to an artificial subset of pure legal claims. As the Report makes expressly clear, that question must be answered by reference to the traditional scope of habeas law. *See* Pet. 27-29.

Finally, the government states that Congress did not mean to alter "fundamentally" its 1996 decision to eliminate review of the asylum filing exceptions. BIO 14. But that was the precise purpose of Section 1252(a)(2)(D): to restore review of previously barred claims to the extent such review was traditionally available in habeas. *See* Pet. 5-8, 27-31.

B. Petitioner's Claim Involves The Application Of Law To Fact.

1. Significantly, the government does not claim that Mr. Khan sought to challenge the underlying historical facts found by the IJ. Rather, the government carefully argues that Mr. Khan's claim is "fact-bound." BIO 14. But that is the definition of a claim involving the application of law to fact: whether the established facts satisfy the statutory standard. The government is thus wrong in arguing (at 15) that Mr. Khan's claim is unreviewable because he "takes issue with the Board's holding that he failed to adduce facts

sufficient" to satisfy the exception for extraordinary circumstances.

The government also argues that Mr. Khan's claim is unreviewable because the "applicable principles are undisputed." BIO 14. But the applicable principles are undisputed only in the sense that the IJ and BIA properly stated – at the most general level – that petitioner had to show extraordinary circumstances related to his failure to timely file his application. As this Court has repeatedly explained, however, a legal standard will often be set forth at a highly general level and will necessarily "acquire content only through application." *Ornelas*, 517 U.S. at 697. *See* Pet. 33-34. Thus, even where the BIA correctly states the general standards governing changed or extraordinary circumstances, it has often "effectively" narrowed the exceptions through "misapplication" of those general standards. *Ge*, 2009 WL 4281472, at *4.

Here, the IJ did not dispute the basic historical fact that Mr. Khan suffered from post-traumatic symptoms. But the IJ noted that petitioner was working and engaging in other normal life activities. Pet. App. 50a The BIA thus affirmed the IJ's ruling that petitioner had not satisfied the statute, reasoning that petitioner was not "unable" to file a timely application. Pet. App. 27a. But that view of the statute is wrong.

The statute states only that the circumstances must "relate" to the untimely filing. 8 U.S.C. 1158(a)(2)(D). It does not require an applicant to be literally unable to function. *See, e.g.*, Karen Musalo & Marcelle Rice, *Center for Gender & Refugee Studies: Implementation of the One-Year Bar to Asylum*, 31 Hastings Int'l & Comp. L. Rev. 693, 703-04 (Summer 2008) (noting that this is a common error of the BIA in interpreting the statute, and explaining that, unlike regular life activities, the filing of an asylum application is a direct reminder of the abuses). *See also* Amicus Brief in *Gomis*, at 17-21 (noting examples where BIA found no extraordinary circumstances because the applicant was capable of working, paying bills or attending church).

2. The government also notes that the statute provides that the Attorney General "may" excuse a late-filed application if the applicant satisfies the threshold statutory eligibility criteria (*i.e.*, changed or extraordinary circumstances). BIO 12-13. But the fact that a statute may vest the ultimate decision in the agency's discretion does not mean that the threshold statutory eligibility criteria are likewise discretionary and unreviewable. *St. Cyr*, 533 U.S. at 307-08.[8]

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[8] The petition addressed (at 34-35) the statute's use of the phrase "to the satisfaction," and the government has not responded to those arguments.

Finally the government is wrong that review of Mr. Khan's claim would "convert every" claim into a question of law. BIO 15. Review of his claim does not mean that the courts could review findings of historical fact or any ultimate discretionary authority the IJ may possess.

* * * *

This case will allow the Court to decide a recurring and important issue that has divided the circuits for many years. Review is warranted.

CONCLUSION

The petition should be granted.[9]

Respectfully submitted,

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[9] If the Court chooses to grant review on this issue, but to do so in *Gomis*, No. 09-194, petitioner respectfully requests that the Court hold his case pending the outcome of *Gomis*.

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